

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SECOND APPEAL No 154 of 1984

For Approval and Signature:

Hon'ble MR.JUSTICE J.R.VORA

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1. Whether Reporters of Local Papers may be allowed : YES  
to see the judgements?
  2. To be referred to the Reporter or not? : NO
  3. Whether Their Lordships wish to see the fair copy : NO  
of the judgement?
  4. Whether this case involves a substantial question : NO  
of law as to the interpretation of the Constitution  
of India, 1950 of any Order made thereunder?
  5. Whether it is to be circulated to the Civil Judge? : NO

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PATEL RUPSIBHAI RASENBHAI

Versus

VAJIR JAHUBHAI KARA  
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Appearance:

MS KUSUM M SHAH for Petitioner  
MR VC DESAI for Respondents No. 1 to 4  
Respondents No. 5 served  
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CORAM : MR.JUSTICE J.R.VORA

Date of decision: 23/02/2001

ORAL JUDGEMENT

1. This Second Appeal is filed by the appellant  
being aggrieved by judgment and decree of the District  
Judge, Banaskantha at Palanpur in Regular Civil Appeal

No. 30 of 1980, whereby the learned District Judge set aside the judgment and decree of Civil Judge (J.D.) at Vav in Regular Civil Suit No. 1 of 1977.

2. The facts giving rise to this Appeal are as under :

The present respondents No. 1 to 4 filed Regular Civil Suit No. 1 of 1977 in the Court of Civil Judge (JD) at Vav District Banaskantha alleging that they were the resident of village Kalyanpura, Tal. Vav, District Banaskantha, which was a jagiri village. Vajir Jahubai Kara, present respondent No.1 - plaintiff No.1 is widow of Vajir Kara Khema and respondents No. 2, 3 and 4 i.e. original plaintiffs No. 2, 3 and 4 are daughters of deceased Vajir Kara Khema. Original defendant No.2 and respondent No.5 - Vajir Dhaya Kara, defendant No.2 in Civil Suit No. 1 of 1977, is the only son of the deceased Vajir Kara Khema. Vajir Kara Khema died about 10 years back from the date of the filing of the suit, which appears to have been filed on 17th January, 1977. Deceased Vajir Kara Khema owned one field, bearing Survey No. 17 at village Kalyanpura, admeasuring 33 acres and 24 gunthas. Deceased was cultivating the field. Original defendant No.2 i.e. respondent No.5 herein, Vajir Dhaya Kara, the only son of deceased Vajir Kara Khema, executed a mortgage deed on 25th February, 1972 in respect of 21 acres of the land for Rs. 8,000/- out of survey No.17 to original defendant No.1, Patel Rupsibhai Rasangbhai, appellant herein, without the knowledge and consent of the original plaintiffs No. 1 to 4 i.e. respondents No. 1 to 4 herein. Original defendant No.1 i.e. appellant herein obtained the possession of 21 acres of land out of survey No. 17 by virtue of the above said mortgage deed executed. Thereafter, on 24th April, 1973, the present respondent No.5 again executed another document for additional Rs. 3,000/- and the land of survey No. 17 by this document of registered sale deed, sold to the present appellant by present respondent No.5 for Rs. 11,000/- in all i.e. Rs. 8,000/- earlier for the mortgage deed and Rs. 3,000/- additional for the deed dated 24.4.1973. It was alleged in the suit by the present respondents No. 1 to 4 that both the transactions were without their knowledge, the property was joint property and along with original defendant No.2 - respondent No.5 herein Vajir Dhaya Kara the plaintiffs No. 1 to 4 - respondents No. 1 to 4 herein had their equal undivided share in the suit property i.e. field survey No.17. Therefore, the relief was claimed that both the above transactions entered into by Vajir Dhaya Kara was not binding to plaintiffs i.e. present

respondents No. 1 to 4. The claim for partition and possession was also prayed.

3. The present respondent No. 5 i.e. defendant No.2 did not file any reply to the suit and the suit proceeded against him ex-parte while defendant No.1 - appellant herein had filed written statement at Exh.5 and contended that original plaintiffs No. 2 to 4 were the daughters and since they were married, they are not entitled to claim any interest in the property. It was alleged that the plaintiff No.1 mother and defendant No.2 the son, were the only heirs, and the suit was filed in their collusion. It was urged that the defendant No.2 was the only male member after the death of his father and plaintiff No.1 had fully consented to the transactions entered into between the original defendants No. 1 and 2. It was also urged that the transactions were entered into for legal necessity by defendant No.2 as Karta of Hindu family. It was urged that defendant No.1 was a bona fide purchaser for value without notice and therefore the suit was required to be dismissed.

4. Learned Trial Judge framed necessary issues at Exh.21 and came to the conclusion that the transactions between defendants No. 1 and 2 were within the knowledge of the plaintiffs. The transactions were entered into by defendant No.2 for the legal necessity. The Trial Court further held that the defendant No.2 was the Manager of the Joint family and had absolute authority to enter into the transactions with defendant No.1. The Trial Court further held that the suit for cancellation of the documents was time barred and was not maintainable in the present form and that the defendant No.1 was a bona fide purchaser for value without notice and for these reasons, the Trial Court was pleased to dismiss the suit of the plaintiffs.

5. Being aggrieved, present respondents No. 1 to 4 original Plaintiffs filed Regular Civil Appeal No. 30 of 1980 in the Court of District Judge, Banaskantha at Palanpur against both the defendants. After hearing both the parties, the learned First Appellate Judge set aside the judgment and decree of the Trial Judge and further declared that the mortgage deed as well as the sale deed both, which were involved in the suit were not binding to the plaintiffs - respondents No.1 to 4 to the extent of their 4/5 share in the suit property. The First Appellate Judge further held that the plaintiffs were entitled to claim partition of their 4/5 share by metes and bounds and they were also entitled to mesne profits to be determined thereafter as per Rules.

6. Being aggrieved by the judgment and decree of the First Appellate Judge, in Regular Civil appeal No. 30 of 1989, pronounced on 5th September, 1983, the original defendant No.1 Patel Rupsibhai Rasangbhai has filed this Second Appeal. While admitting the Appeal, this Court formulated the following issue as substantial question of law to be decided in this Appeal.

" Whether the lower appellate court committed an error in holding that the respondent No.2 has only 1/5th share in the suit property and therefore the mortgage and the sale are not binding on the plaintiffs to the extent of their 4/5th share."

7. Learned Advocate Ms. Kusum M. Shah for the appellant and learned Advocate Mr. V.C. Desai for respondents No. 1 to 4 herein were heard. Respondents No.5 though served was not present.

8. Learned First Appellate Judge from the evidence on record came to the finding of fact that the transactions entered into by respondent No.5 herein were not for the legal necessity. The learned First Appellate Judge also from the evidence on record came to the finding of fact that the defendant No.1 was not a bona fide purchaser for value without notice because it was his legal duty to inquire about the legal necessity which he did not and, therefore, the defendant No.1 was not the bona fide purchaser for value without notice. This finding of fact by the First Appellate Judge cannot be disturbed in the Second Appeal.

9. The learned First Appellate Judge came to the conclusion that Vajir Kara Khema expired in 1956 when Hindu Succession Act, 1956 with its Section 10 was operative, and by virtue of this, widow of deceased i.e. plaintiff No.1 along with the daughters i.e. plaintiffs No. 2 to 4 and the son i.e. defendant No.5 were joint owners of field Survey No.17, which was left intestate by deceased Vajir Kara Khema. The First Appellate Judge therefore rightly held that all the family members i.e. plaintiffs No. 1 to 4 and defendant No.5 had equal undivided shares in the Field Survey No.17 after the death of Vajir Kara Khema and, therefore, the First Appellate Judge rightly held that what was transferred by the mortgage deed dated 25th February, 1972 and what was sold by sale deed dated 24th of April, 1973 by defendant No.2 to defendant No.1 was undivided interest in the joint property. Therefore, the question of transferring

property of joint Hindu family by defendant No.2 did not arise. The First Appellate Judge therefore rightly held that the Trial Judge erred in coming to the conclusion that the widow was not admitted a coparcener and could not be the manager of joint family and, son, the defendant No.2 was the Manager and the karta and he had authority to transfer the property.

10. Learned Appellate Judge also rightly held that the learned Trial Judge erred in concluding that the plaintiffs were required to file a suit for the cancellation of the above two documents. The learned First Appellate Judge has rightly held that none of the plaintiffs were the parties either of the mortgage deed or sale deed in question. The relief which the plaintiffs claimed was that the transactions entered into by defendant No.2 were not binding to their undivided shares and in these circumstances the First Appellate Court rightly held that the suit was not a time barred because of Articles 64 and 65 of the Limitation Act wherein the suit could be brought within 12 years from the date of adverse possession.

11. For the above reasons, the First Appellate Judge set aside the judgment and decree of the Trial Judge dismissing the suit of the plaintiffs and passed the above said order in favour of the plaintiffs. Nothing could be shown to interfere with this finding of the First Appellate Judge.

12. In this view of the matter, this Appeal is without any merit and is hereby dismissed with no order as to costs.

(J.R. Vora, J.)

p.n.nair